Detik Ria Sdn Bhd & Anor v Prudential Corp Holding Ltd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-1100–08 OF 2020
NOR BEE ARIFFIN, HADHARIAH SYED ISMAIL AND MARIANA YAHYA JJCA
22 AUGUST 2022

Contract — Agreements — Call/put option agreement ('CPOA') — Second respondent and first appellant entered into CPOA in respect of shares — First appellant rescinded its exercise of put option shares — Whether prior approval of Bank Negara Malaysia was required to enter into CPOA — Whether appellants were put in position of trust — Whether appellants ought to receive dividends — Whether agreements were illegal — Insurance Act 1996 s 67

This dispute was related to the purchase of the shares of Sri Han Suria Sdn Bhd ('SHS') which was the sole shareholder of Prudential Assurance Malaysia Bhd ('PAMB'). The first and second respondents ('first and second plaintiffs') were foreign companies incorporated in England. The first appellant ('first defendant') was an investment holding company while the second appellant ('second defendant') was a 50% shareholder and a director of the first defendant. The second plaintiff and the first defendant held 51% and 49% respectively of the shareholding of SHS. The second plaintiff and the first defendant entered into the call/put option agreement ('CPOA') where the first defendant agreed to grant a call option to the second plaintiff in respect of its shares in SHS. The CPOA also catered for a put option of the first defendant's shares in SHS. The CPOA was conditional upon the approval of the Foreign Investment Committee, the Minister of Finance, Bank Negara Malaysia ('the bank') and other relevant regulatory authorities in Malaysia. The first defendant issued a notice of exercise of option to sell its shareholding in SHS to the second plaintiff ('the put option notice'). Thereafter, the parties executed the memorandum of deposit ('MOA'), the supplemental call/put option agreement ('SCPOA') and the supplemental memorandum of deposit ('SMOA') (collectively referred to as 'the agreements'). However, the first defendant indicated its wishes to rescind its exercise of the put option and to maintain its 49% shareholding in SHS. Prudential Corp Asia informed the first defendant that the voluntary exercise of the put option was valid and irrevocable and no grounds existed for its rescission and that the Prudential Group intended to complete the acquisition of the put option shares once the requisite regulatory approvals had been obtained. The bank stated to Prudential Corp Asia and the first defendant, that the bank had no objection towards the first plaintiff's application to complete the acquisition of the first

defendant's 49% effective interest in PAMB with immediate effect. Following the approval obtained from the bank, which according to the plaintiffs made the agreements unconditional and capable of performance, Prudential Corp Asia issued a letter to the first defendant which enclosed the share transfer form and the directors' resignation letter for the first defendant's further action, in order to complete the first plaintiff acquisition of the first defendant's shares held in SHS. Prudential Corp Asia issued another letter to the first defendant, demanding for the first defendant to execute and return the share transfer form and to return the executed director's resignation letter within 14 days from the date of the letter, failure of which would constitute a breach of the first defendant's contractual obligations under cl 2.1.1 and 2.3 of the SCPOA. The first defendant did not return the duly executed share transfer form and the resignation letter. By way of a deed of assignment, the second plaintiff had assigned all of its rights, and benefits under the CPOA, SCPOA, MOA and SMOA to the first plaintiff. Consequent upon the deed of assignment, the plaintiffs said the first plaintiff became a party to the CPOA, SCPOA, MOA and SMOA entered into by the first defendant and the plaintiffs was entitled to enforce the put option exercise against the defendants. The plaintiffs filed an originating summons against the defendants for, inter alia, a declaration that the agreements were valid, subsisting and binding on the plaintiffs and the first defendant, a declaration that the first defendant's notice of exercise of option was irrevocable, valid, subsisting and binding on the first defendant, and a mandatory injunction compelling the first defendant to execute the share transfer form in respect of the option shares. The plaintiffs claimed that the second plaintiff was entitled to compel the first defendant to complete the put option exercise. The defendants took the position that the true question on which the validity of the CPOA hinged was not whether it was conditional or not but whether the prior approval of the bank was required before the parties could enter into it as required under s 67 of the Insurance Act 1996 ('Act 553') which was the governing law at the material time. The High Court allowed the plaintiffs' application and concluded that prior approval was not necessary for the parties to enter into the CPOA as approval was only required for the carrying into effect of the agreements when the bank gave its approval. Hence, this appeal by the defendants.

Held, dismissing the appeal with costs:

(1) As the first defendant had voluntarily exercised the put option, therefore, all obligations pursuant to the CPOA and SCPOA needed to be carried out by the parties. The learned judge had correctly observed that both parties had intended to see the CPOA and the SCPOA to its completion. It was always the intention of the parties that upon the exercise of the put option, the first defendant was to be paid a percentage of the purchase consideration for the option shares, and this was to be paid even before the bank's approval was obtained. The defendants' contentions that the

agreement by the second plaintiff to make payment to the first defendant illustrated the fact that the second plaintiff was prepared to circumvent the laws of Malaysia by making the payments, was unreasonable and unwarranted (see paras 82–83 & 94).

(2) As the majority shareholder of SHS holding 51% shares, the first plaintiff had control of SHS and that the holding of the option shares on trust was permissible under the law and did not render the CPOA and SCPOA illegal as the option shares remained in the name of the first defendant. The defendants' argument that there was no basis for the second plaintiff to rely on the MOA or the SMOA as there could be no valid trust in the circumstances of this dispute as the put option notice had been rescinded and the CPOA and SCPOA not completed, was devoid of merit. The argument in any event could not hold water as there was no rescission of the CPOA and the SCPOA (see paras 95 & 103).

(3) The defendant had voluntarily approved all board and shareholder resolutions of SHS for only the preference shareholder to be paid dividends. By its conduct, the defendants should be estopped from raising this issue. Both parties had consistently conducted themselves in accordance with the arrangements and understandings reached between them on the basis that the CPOA was valid when the put option was exercised, and that both parties had intended to see the CPOA and the SCPOA to its completion subject to the bank's approval being obtained. Thus, the defendants' complaints were without basis (see paras 105–107).

(4) In the context of s 67 of Act 553, the words 'enter into' must be read together with the effect of the words 'if carried out'. When read together, it was clear that the prohibition was against the carrying out of the transaction ie its implementation without obtaining the bank's approval and not by the mere execution of a conditional contract such as the CPOA and SCPOA. The prohibition was not against the entering into of a contract. The prohibition was against the carrying out of the contract which would lead to the acquisition or disposal of more than 5% shares of a licensee without the prior approval of the bank. The CPOA was valid even though approval was not obtained prior to its execution. The bank's letter was, in its context, a written approval for the transaction reflected in the CPOA within the meaning of s 67. The defendants lacked legal basis to mount any challenge on the bank's approval. The bank's letter showed that 100% foreign ownership in a Malaysian insurance company was permissible. As the entire transaction in question was made contingent upon obtaining the bank's approval, thus no question of illegality arose. Therefore, the agreements were not void and invalid. As the condition precedent had been fulfilled when the bank gave its approval, it followed that s 36 of the Contracts Act 1950 relied on by the defendants, was

inapplicable. The defendants' plea of restitution did not apply, as the said agreements were not illegal or void (see paras 136, 138, 152, 155, 157 & 165–167). A

[Bahasa Malaysia summary

Pertikaian ini berkaitan dengan pembelian saham Sri Han Suria Sdn Bhd ('SHS') yang merupakan pemegang saham tunggal Prudential Assurance Malaysia Bhd ('PAMB'). Responden pertama dan kedua ('plaintif pertama dan kedua') adalah syarikat asing yang diperbadankan di England. Perayu pertama ('defendan pertama') ialah syarikat pegangan pelaburan manakala perayu kedua ('defendan kedua') ialah pemegang saham 50% dan pengarah defendan pertama. Plaintif kedua dan defendan pertama masing-masing memegang 51% dan 49% daripada pegangan saham SHS. Plaintif kedua dan defendan pertama menandatangani perjanjian pilihan membeli/menjual ('CPOA') di mana defendan pertama bersetuju untuk memberikan pilihan membeli kepada plaintif kedua berkenaan dengan sahamnya dalam SHS. CPOA juga menyediakan pilihan menjual saham defendan pertama dalam SHS. CPOA adalah bersyarat dengan kelulusan Jawatankuasa Pelaburan Asing, Menteri Kewangan, Bank Negara Malaysia ('bank') dan pihak berkuasa kawal selia lain yang berkaitan di Malaysia. Defendan pertama mengeluarkan notis pelaksanaan pilihan untuk menjual pegangan sahamnya dalam SHS kepada plaintif kedua ('notis pilihan menjual'). Selepas itu, pihak-pihak melaksanakan memorandum deposit ('MOA'), perjanjian pilihan membeli/menjual tambahan ('SCPOA') dan memorandum deposit tambahan ('SMOA') (secara kolektif dirujuk sebagai 'perjanjian'). Walau bagaimanapun, defendan pertama menyatakan hasratnya untuk membatalkan pelaksanaan pilihan menjual dan mengekalkan 49% pegangan sahamnya dalam SHS. Prudential Corp Asia memaklumkan defendan pertama bahawa pelaksanaan sukarela pilihan menjual adalah sah dan tidak boleh ditarik balik dan tiada alasan wujud untuk pembatalannya dan bahawa Prudential Group berhasrat untuk menyelesaikan pemerolehan saham pilihan menjual sebaik sahaja kelulusan kawal selia yang diperlukan telah diperolehi. Bank menyatakan kepada Prudential Corp Asia dan defendan pertama, bahawa bank tidak mempunyai bantahan terhadap permohonan plaintif pertama untuk menyelesaikan pemerolehan 49% kepentingan efektif defendan pertama dalam PAMB berkuat kuasa serta-merta. Berikutan kelulusan yang diperoleh daripada bank, yang menurut plaintif menjadikan perjanjian tanpa syarat dan mampu dilaksanakan, Prudential Corp Asia mengeluarkan surat kepada defendan pertama yang menyertakan borang pemindahan saham dan surat peletakan jawatan pengarah untuk tindakan selanjutnya defendan pertama, untuk melengkapkan pemerolehan plaintif pertama bagi saham defendan pertama yang dipegang dalam SHS. Prudential Corp Asia mengeluarkan satu lagi surat kepada defendan pertama, menuntut defendan pertama untuk melaksanakan dan memulangkan borang pemindahan saham dan mengembalikan surat peletakan jawatan pengarah yang telah dilaksanakan dalam tempoh 14 hari

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dari tarikh surat itu, yang mana kegagalannya akan menjadi pelanggaran kewajipan kontrak defendan pertama di bawah klausa 2.1.1 dan 2.3 SCPOA. Defendan pertama tidak memulangkan borang pemindahan saham yang telah disempurnakan dengan sewajarnya dan surat peletakan jawatan. Melalui surat ikatan penyerahan hak, plaintif kedua telah menyerahkan semua haknya, dan kepentingan di bawah CPOA, SCPOA, MOA dan SMOA kepada plaintif pertama. Ekoran daripada surat ikatan penyerahan hak, plaintif menyatakan plaintif pertama menjadi pihak kepada CPOA, SCPOA, MOA dan SMOA yang dimeterai oleh defendan pertama dan plaintif berhak untuk menguatkuasakan pelaksanaan pilihan menjual terhadap defendan. Plaintif memfailkan saman pemula terhadap defendan untuk, antara lain, pengisytiharan bahawa perjanjian itu sah, wujud dan mengikat plaintif dan defendan pertama, pengisytiharan bahawa notis defendan pertama mengenai pelaksanaan pilihan tidak boleh ditarik balik, sah, berterusan dan mengikat defendan pertama, dan injunksi mandatori yang memaksa defendan pertama untuk melaksanakan borang pemindahan saham berkenaan dengan saham pilihan. Plaintif mendakwa bahawa plaintif kedua berhak untuk memaksa defendan pertama menyelesaikan pelaksanaan pilihan menjual. Defendan mengambil pendirian bahawa persoalan sebenar yang bergantung kepada kesahihan CPOA bukanlah sama ada ia bersyarat atau tidak tetapi sama ada kelulusan bank terlebih dahulu diperlukan sebelum pihak-pihak boleh memasukinya seperti yang dikehendaki di bawah s 67 Akta Insurans 1996 ('Akta 553') yang merupakan undang-undang yang mengawal pada masa itu. Mahkamah Tinggi membenarkan permohonan plaintif dan membuat kesimpulan bahawa kelulusan awal tidak diperlukan bagi pihak-pihak untuk memasuki CPOA kerana kelulusan hanya diperlukan untuk melaksanakan perjanjian apabila bank memberikan kelulusannya. Oleh itu, rayuan ini oleh defendan.

Diputuskan, menolak rayuan dengan kos:

(1) Memandangkan defendan pertama telah secara sukarela melaksanakan pilihan menjual, oleh itu, semua kewajipan menurut CPOA dan SCPOA perlu dilaksanakan oleh pihak-pihak. Hakim yang bijaksana telah memutuskan dengan betul bahawa kedua-dua pihak berhasrat untuk melihat CPOA dan SCPOA sehingga selesai. Ia sentiasa menjadi hasrat pihak-pihak bahawa selepas melaksanakan pilihan menjual, defendan pertama akan dibayar peratusan balasan pembelian bagi saham pilihan, dan ini perlu dibayar walaupun sebelum kelulusan bank diperolehi. Pendapat defendan bahawa perjanjian oleh plaintif kedua untuk membuat pembayaran kepada defendan pertama menggambarkan fakta bahawa plaintif kedua bersedia untuk memintas undang-undang Malaysia dengan membuat pembayaran, adalah tidak munasabah dan tidak wajar (lihat perenggan 82–83 & 94).

(2) Sebagai pemegang saham majoriti SHS yang memegang 51% saham,

plaintif pertama mempunyai kawalan ke atas SHS dan bahawa pemegangan saham pilihan atas amanah dibenarkan di bawah undang-undang dan tidak menjadikan CPOA dan SCPOA tidak sah kerana saham pilihan kekal atas nama defendan pertama. Hujahan defendan bahawa tiada asas untuk plaintif kedua bergantung kepada MOA atau SMOA kerana tidak mungkin ada amanah yang sah dalam keadaan pertikaian ini kerana notis pilihan menjual telah dibatalkan dan CPOA dan SCPOA tidak diselesaikan, adalah tidak bermerit. Hujahan dalam apa jua keadaan tidak dapat dipertahankan kerana tiada pembatalan CPOA dan SCPOA (lihat perenggan 95 & 103).

(3) Defendan telah secara sukarela meluluskan semua resolusi lembaga dan pemegang saham SHS untuk hanya pemegang saham keutamaan yang akan dibayar dividen. Dengan kelakuannya, defendan harus dihalang daripada membangkitkan isu ini. Kedua-dua pihak secara konsisten menjalankan diri mereka mengikut perkiraan dan persefahaman yang dicapai di antara mereka atas dasar bahawa CPOA adalah sah apabila pilihan menjual dilaksanakan, dan bahawa kedua-dua pihak berhasrat untuk melihat CPOA dan SCPOA sehingga selesai tertakluk kepada kelulusan bank diperolehi. Oleh itu, aduan defendan adalah tanpa asas (lihat perenggan 105–107).

(4) Dalam konteks s 67 Akta 553, perkataan 'membuat' harus dibaca bersama-sama dengan kesan perkataan 'jika dijalankan'. Apabila dibaca bersama, adalah jelas bahawa larangan tersebut adalah terhadap pelaksanaan transaksi iaitu pelaksanaannya tanpa mendapat kelulusan bank dan bukan hanya dengan pelaksanaan kontrak bersyarat seperti CPOA dan SCPOA. Larangan itu bukan menentang pemeteraian kontrak. Larangan itu adalah terhadap pelaksanaan kontrak yang akan membawa kepada pemerolehan atau pelupusan lebih daripada 5% saham pemegang lesen tanpa kelulusan bank terlebih dahulu. CPOA adalah sah walaupun kelulusan tidak diperoleh sebelum pelaksanaannya. Surat bank adalah, dalam konteksnya, kelulusan bertulis untuk urusniaga yang dicerminkan dalam CPOA dalam pengertian s 67. Defendan tidak mempunyai asas undang-undang untuk melancarkan sebarang cabaran atas kelulusan bank. Surat bank menunjukkan bahawa 100% pemilikan asing dalam syarikat insurans Malaysia adalah dibenarkan. Memandangkan keseluruhan urusniaga yang dipersoalkan dibuat bergantung dengan pemerolehan kelulusan bank, maka tiada persoalan menyalahi undang-undang timbul. Oleh itu, perjanjian itu tidak terbatal dan sah. Memandangkan syarat terdahulu telah dipenuhi apabila bank memberikan kelulusannya, ia berikutan bahawa s 36 Akta Kontrak 1950 yang disandarkan oleh defendan, adalah tidak terpakai. permohonan pembayaran balik defendan tidak terpakai, kerana perjanjian tersebut tidak menyalahi undang-undang atau tidak sah (lihat perenggan 136, 138, 152, 155, 157 & 165–167).]

Cases referred to

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] 1 MLJ 47; [1959] 1 MLR 206, PC (refd)

Ace Ina International Holdings Ltd v Advance Synergy Capital Bhd (D-24-NCC–72 of 2009) (unreported) (refd)

AJS v JMH and another appeal [2022] 1 MLJ 778; [2022] 1 CLJ 331, FC (refd)

Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain [2022] 3 MLJ 450; [2022] 4 CLJ 657, FC (folld)

Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid [1979] 2 MLJ 244, FC (refd)

Che Esah & Anor v Che Limah [1966] 1 MLJ 36, FC (refd)

Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor [1994] 1 MLJ 369; [1994] 2 CLJ 143, SC (refd)

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1, FC (refd)

Government of Malaysia v Zainal bin Hashim [1977] 2 MLJ 254b, FC (refd)

Gula Perak Bhd v Datuk Lim Sue Beng & other appeals [2018] MLJU 2107; [2019] 1 CLJ 153, FC (refd)

Hartaya Sdn Bhd (receiver and manager appointed) & Ors v Malayan Banking Bhd & Ors [2010] 7 MLJ 200; [2010] 9 CLJ 469, HC (refd)

Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd [2003] 3 MLJ 152; [2003] 3 CLJ 201, CA (refd)

Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals [2020] 1 MLJ 311; [2020] 1 CLJ 193, FC (refd)

Kin Nam Development Sdn Bhd v Khau Daw Yau [1984] 1 MLJ 256; [1984] 1 CLJ 347, FC (refd)

MMI Industries Sdn Bhd v Let Sin Industries Sdn Bhd [2009] MLJU 709; [2010] 1 CLJ 36, CA (refd)

Malayan Banking Bhd v Neway Development Sdn Bhd & Ors [2017] 5 MLJ 180, FC (refd)

Malaysian Airline System Bhd v Competition Commission and another appeal [2021] MLJU 2089, CA (refd)

Maple Amalgamated Sdn Bhd & Anor v Bank Pertanian Malaysia Bhd [2021] 6 MLJ 348, FC (folld)

Marks v Board (1930) 46 TLR 424 (refd)

National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211, FC (refd)

Quilter v Mapleson (1882) 9 QBD 672, CA (refd)

Tan Chee Hoe Sdn Bhd v Code Focus Sdn Bhd [2014] 3 MLJ 301; [2014] 3 CLJ 141, FC (refd)

Tenaga Nasional Bhd v Kamarstone Sdn Bhd [2014] 2 MLJ 749; [2014] 1 CLJ 207, FC (refd)

Vellasamy a/l Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN 35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) v Gurbachan Singh a/l Bagawan Singh & Ors [2010] 5 MLJ

437; [2009] 5 MLRA 447; [2012] 2 CLJ 712, CA (refd)
Yakin Tenggara Sdn Bhd v RHB Bank Bhd & Ors and other appeals [2017] 2 MLJ 774, CA (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 (repealed by the Financial Services Act 2013) ss 45, 45(1), 49(1)(b), 49(2)
Construction Industry Payment and Adjudication Act 2012
Contracts Act 1950 ss 21, 24, 32, 33, 36, 36(1), 66
Financial Services Act 2013 ss 87, 270, 272
Insurance Act 1996 (repealed by the Financial Services Act 2013) ss 67, 67(1), (2), (3), 68, 68(1), (12), 187(1), Part VI
Interpretation Acts 1948 and 1967 s 17A
National Land Code s 214A, 214A(1)

Appeal from: Originating Summons No WA-24NCC-479–09 of 2019 (High Court, Kuala Lumpur)

Zulkefli Ahmad Makinudin (with Malik Imtiaz Sarwar, Wira Mohd Hafarizam Harun, Abu Bakar Isa Ramat, Tey Jun Ren, Wong Ming Yen and Nor Hazira Abu Haiyan) (Jr Tey) the appellants.
Gopal Sri Ram (with Austen Pereira, Saritha Devi Kirupalani and Nur Ainnabila Rosdi) (Zaid Ibrahim & Co) the respondents.

Nor Bee Ariffin JCA:

INTRODUCTION

[1] This dispute relates to the purchase of the shares of Sri Han Suria Sdn Bhd ('SHS') which is the sole shareholder of Prudential Assurance Malaysia Bhd ('PAMB'). PAMB is a public limited company incorporated in Malaysia with a total issued capital of RM100m and is in the business of, inter alia, underwriting of insurance business. PAMB is a licensed insurer pursuant to the Financial Services Act 2013 (Act 758). The second respondent and the first appellant held 51% and 49% respectively of the shareholding of SHS.

[2] The second respondent and the first appellant entered into the call/put option agreement ('CPOA') dated 27 February 2002 where the first appellant agreed to grant a call option to the second respondent in respect of its shares in SHS. The CPOA also catered for a put option of the first appellant's shares in SHS. The CPOA was conditional upon the approval of the Foreign Investment Committee ('FIC'), the Minister of Finance ('MOF'), Bank Negara Malaysia ('bank') and other relevant regulatory authorities in Malaysia.

A **[3]** On 15 December 2008, the first appellant issued a notice of exercise of option to sell its 49,000 shareholding in SHS to the second respondent. Thereafter, the parties executed the memorandum of deposit dated 12 April 2009 (MOA), the supplemental call/put option agreement dated 9 September 2009 (SCPOA) and the supplemental memorandum of deposit dated
B 9 September 2009 (SMOA) (collectively referred to as 'the said agreements').

[4] By a letter dated 30 April 2018, the first appellant indicated its wishes to rescind its exercise of the put option and to maintain its 49% shareholding in SHS.
C

[5] The respondents filed an originating summons ('OS') against the appellants for, inter alia, a declaration that the said agreements were valid, subsisting and binding on the respondents and the first appellant, a declaration that the first appellant's notice of exercise of option dated 15 December 2008
D was irrevocable, valid, subsisting and binding on the first appellant, a mandatory injunction compelling the first appellant to execute the share transfer form in respect of the option shares and consequential orders and directions as set out in Annexure A to the OS. The respondents claimed that the second respondent was entitled to compel the first appellant to complete
E the put option exercise.

[6] The issue between the parties was whether prior approval of the bank was required to enter into the CPOA.
F

[7] The respondents said that prior approval of the bank was not required to enter into the CPOA, and that the approval was merely a condition to the enforceability of the CPOA.

G **[8]** The appellants took the position that the true question on which the validity of the CPOA hinged was not whether it was conditional or not but whether the prior approval of the bank was required before the parties could enter into it as required under s 67 of the Insurance Act 1996 (Act 553) which was the governing law at the material time.
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[9] The High Court concluded that prior approval was not necessary for the parties to enter into the CPOA as approval was only required for the carrying into effect of the said agreements when the bank gave its approval.

I THE BACKGROUND

[10] The parties in this judgment shall be referred to as they were in the High Court, the respondents being the plaintiffs and the appellants being the defendants.

[11] The plaintiffs are foreign companies incorporated in England. A

[12] The first defendant is an investment holding company.

[13] The second defendant is a 50% shareholder and a director of the first defendant. B

[14] The second defendant is also the first defendant's nominee director on the board of SHS.

C

[15] The second defendant, according to the plaintiffs, was named as a defendant to give effect to the relief sought for in the OS.

[16] On 15 December 2008, the first defendant issued a notice of exercise of option to sell their 49,000 ordinary shares of RM1 each in SHS to the second plaintiff ('put option notice') pursuant to cl 4 of the CPOA. The put option notice also stated that based on cl 4.2(b) of the COPA, the purchase consideration shall be RM114,120,328.77 ('purchase consideration'). The methodology on the purchase price was computed based on the formula in cl 4.2(b) of the CPOA. D E

[17] On 12 April 2009, as security for SHS paying all monies due or accruing to the second plaintiff as chargee upon its exercise to redeem all or any of the 'A' Preference Shares, the first defendant as the chargor, the second defendant and Tunku Shahabuddin bin Tunku Besar Burhanuddin ('Tunku Shahabuddin') as the shareholders of the chargor, entered into a MOA relating to the 49,000 shares of the first defendant for the benefit of the chargee. F

[18] On 9 September 2009, the second plaintiff and the first defendant entered into the SCPOA. The SCPOA provided for deferred completion of the purchase of the option shares and the revised methodology to compute the purchase price for the first defendant's 49% shareholding in SHS. As an initial deposit and towards part payment of the purchase consideration, the second plaintiff was to pay the first defendant the sum of RM69.3m to be paid in the manner stipulated in sub-cll 2.1.1.1 and 2.1.1.2. In accordance thereof, the first defendant was paid a sum of RM69.3m. RM50m has been paid earlier and the balance of RM19.3m were paid on 27 July 2009 and 25 August 2009. G H

[19] Pursuant to the SCPOA, certain amendments were made to the terms of the CPOA: I

(a) in cl 4.1.3, the deletion of the definition of 'put option period' (12 years from the date of the COPA); and

A (b) in cl 4.1.6, the deletion of cll 4.1 to 4.3 of the CPOA as the provisions were no longer applicable since the first defendant had already exercised the put option. The said provision was substituted by cl 2.1 of the SCPOA which provides for the deferment of the completion of the sale and purchase of the option shares.

B

[20] On 9 September 2009, the second plaintiff as the chargee, the first defendant as the chargor, the second defendant and Tunku Shahabuddin executed the SMOA as a condition of the second plaintiff entering into the SCPOA and as security for the first defendant repaying the initial sum of C RM69.3m and the balance of the purchase consideration ('the secured sums').

[21] By virtue of cl 2.1 and 2.2 of the SMOA, a further charge was created over the 49,000 ordinary shares in SHS in favour of the second plaintiff D wherein it was agreed that if the first defendant was to be wound up before the completion of the put option exercise, the secured sums was to be immediately repayable to the second plaintiff.

[22] Vide a letter dated 30 April 2018 to Prudential Corp Asia, the first E defendant stated that it wished to rescind the exercise of the put option and maintained its 49% shareholding in SHS, and would refund to the plaintiffs the total payment received plus a reasonable rate of interest.

[23] In response, vide a letter dated 16 May 2018, Prudential Corp Asia F informed the first defendant that the voluntary exercise of the put option in 2008 was valid and irrevocable and no grounds existed for its rescission and that the Prudential Group intends to complete the acquisition of the put option shares once the requisite regulatory approvals have been obtained.

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[24] There was no response by the first defendant to this letter.

[25] Vide a letter dated 10 June 2019 to Prudential Corp Asia and the first defendant, the bank stated that the bank has no objection towards the first H plaintiff's application to complete the acquisition of the first defendant's 49% effective interest in PAMB with immediate effect. The bank had also stated that it was notified by the first defendant that the first defendant intended to maintain its shareholding in SHS, and the bank had requested the parties to resolve the issue expediently.

I

[26] Following the approval obtained from the bank, which according to the plaintiffs made the said agreements unconditional and capable of performance, Prudential Corp Asia issued a letter on 22 July 2019 to the first defendant which enclosed the share transfer form and the directors' resignation letter for

the first defendant's further action, in order to complete the first plaintiff acquisition of the first defendant's 49,000 ordinary shares held in SHS.

[27] On 24 July 2019, Prudential Corp Asia received the first defendant's letter dated 22 July 2019, wherein the first defendant stated, inter alia, the following:

(a) the first defendant was of the view that the methodology for computation of the put option price for the 49% interest held by the first defendant in SHS as set out in the CPOA, and amended by the SCPOA, was misleading and unreasonable and that the valuation of the first defendant's 49% equity interest should have been significantly higher;

(b) the first defendant would not complete the transfer of the 49% equity interest in SHS and would retain the said shares;

(c) the first defendant had proposed to repay Prudential Groups the monies received by the first defendant following the put option exercise plus a reasonable rate of interest; and

(d) the first defendant was prepared to pay Prudential a sum of RM1.766 billion which the first defendant claimed was a fair value of the 49% equity interest in SHS.

[28] On 12 August 2019, Prudential Corp Asia responded to the first defendant's letter dated 22 July 2019 stating, inter alia, as follows:

(a) in respect of the allegation that the valuation of the shares was misleading and unreasonable, the first defendant had not provided any grounds to substantiate the said statement;

(b) there existed no ground for the first defendant to challenge either the put option price, or the valuation of the shares;

(c) as the bank had already issued the first defendant and Prudential a letter dated 10 June 2019 indicating that the bank had no objection to the acquisition of the first defendant's 49% equity interest in SHS by the first plaintiff, the share transfer form, and the director's resignation letter must be executed for the completion of the acquisition of the shares and in compliance with the said agreements executed between the first defendant and the second plaintiff; and

(d) the first defendant was requested to execute the share transfer form and caused the execution of the director's resignation letter pursuant to cl 2.1.1 and 2.3 of the SCPOA without any further delay in order to complete the acquisition of the said shares.

A **[29]** On 2 September 2019, Prudential Corp Asia issued another letter to the first defendant, demanding for the first defendant to execute and return the share transfer form and to return the executed director's resignation letter within 14 days from the date of the letter, failure of which would constitute a breach of the first defendant's contractual obligations under cl 2.1.1 and 2.3 of the SCPOA.

[30] The first defendant did not return the duly executed share transfer form and the resignation letter.

C

[31] By way of a deed of assignment dated 16 September 2019 ('deed of assignment'), the second plaintiff had assigned all of its rights, and benefits under the CPOA, SCPOA, MOA and SMOA to the first plaintiff.

D **[32]** On the assignment, the plaintiffs took the following position. Consequent upon the deed of assignment, the plaintiffs said the first plaintiff became a party to the CPOA, SCPOA, MOA and SMOA entered into by the first defendant and the second plaintiff and the first plaintiff was entitled to enforce the put option exercise against the defendants.

E

[33] On 18 September 2019, the plaintiffs filed the OS.

[34] The defendant filed a counterclaim against the plaintiffs for restitution and sought the following orders:

F

(a) declaration that the CPOA, SCPOA, MOA and SMOA are illegal and unenforceable;

(b) that the second plaintiff pay the first defendant the sum of RM2,217,732,160 being 49% of the shareholding dividends declared by SHS from 2009 to 2019;

G

(c) interests on the sum adjudged at para (b) above at the rate of 5%pa from the date of the judgment until full realisation;

H (d) costs; and

(e) any other relief as deemed appropriate by this honourable court.

[35] The learned judge allowed the plaintiffs' application and all the prayers contained therein except for orders as to costs on an indemnity basis found at prayer 4 of the OS.

I

PROCEEDINGS AT THE HIGH COURT

[36] We summarised the learned judge's grounds of judgment (GOJ) as follows.

Whether the CPOA was void for illegality?

[37] The learned judge had scrutinised the provisions in the CPOA and found that the case hinged on whether the CPOA was in fact a conditional contract as claimed by the plaintiffs. It was so held after examining several case authorities including the majority decision in *Gula Perak Bhd v Datuk Lim Sue Beng & other appeals* [2018] MLJU 2107; [2019] 1 CLJ 153 (FC), *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 (FC), *MMI Industries Sdn Bhd v Let Sin Industries Sdn Bhd* [2009] MLJU 709; [2010] 1 CLJ 36 (CA) and *Marks v Board* (1930) 46 TLR 424 and *Hartaya Sdn Bhd (receiver and manager appointed) & Ors v Malayan Banking Bhd & Ors* [2010] 7 MLJ 200; [2010] 9 CLJ 469 (HC), *Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd* [2003] 3 MLJ 152; [2003] 3 CLJ 201 (CA) and *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] 1 MLJ 47; [1959] 1 MLR 206 (PC).

[38] His Lordship opined that the general position in law was that there was no prohibition to make conditional or contingent contracts with an express term incorporated in the agreement that the intended contract or agreement was only operable when the condition stated in the contract or agreement was fulfilled. The said agreements were only enforceable upon the obtaining the approval of the bank on 10 June 2019. However, until the approval was given, liability for further performance remained unenforceable and suspended although neither party could resile from it until it could be definitely ascertained that the condition could not be fulfilled.

[39] His Lordship held that, applying the principles in *Gula Perak*, it is clear that the said agreements were not in any manner illegal. With reference to the Federal Court decision in *Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor* [1994] 1 MLJ 369; [1994] 2 CLJ 143 that a contract cannot be entered and be effective if it went against the express provision of the law, the learned judge was of the view that the facts in *Coramas* were distinguishable.

Whether there was a mutual mistake between the parties?

[40] It was contended by learned counsel for the defendants that the parties were labouring under a mutual mistake with regard to the validity of the CPOA. The argument of the defendant was that as the condition precedent was not satisfied within the time fixed (see cll 2.3 and 2.1 of the CPOA), there

was a mutual mistake where the parties went on to conduct themselves thinking that they could still rely on the terms of the CPOA when in reality the CPOA was inoperative due to lapse of time. The learned judge found that the conduct of both parties did not suggest any mutual mistake. There was consensus between the parties to extend the time frame.

Whether estoppel applicable?

[41] The defendants argued that estoppel was not applicable when there was illegality. His Lordship held that no illegality had been established as a result of the conditional contract entered into between the parties. The learned judge said the defendants were estopped from denying that both parties never intended to see the CPOA and/or the SCPOA to its completion. This was borne out the conduct of the parties themselves and in particular, the conduct of the defendants who were the party exercising the put option.

[42] It was always the intention of parties to the said agreements that upon the exercise of the put option, the first defendant was to be paid a percentage of the purchase consideration for the option shares. This was to be paid even before the bank's approval was obtained. Valuable consideration had been passed. The first defendant had reaped the benefit of the terms of the CPOA Agreements by accepting payment in excess of RM109m. In the circumstances, the defendants were clearly estopped from claiming that the terms of the said agreements were misleading and unenforceable. More so when such a claim only arose for the first time on 22 July 2019, after more than ten years of faithfully abiding to the terms of the said agreements.

Entitlements to dividends

[43] The learned judge had examined the affidavit evidence including the resolutions exhibited by the plaintiffs between the period of 24 September 2009 to 21 November 2019 which documented the entitlement of the second plaintiff to dividends. The learned judge held that the conferment of these shares was as a result of resolution by the Board and shareholders of SHS and the second plaintiff derived its entitlement to the dividends as a result of its status as a preference shareholder. The learned judge held that the first defendant had failed to show why it was entitled to any dividends.

The assignment

[44] As regard the deed of assignment which turned on the issue of privity between the first plaintiff and the first defendant, the learned judge ruled that it was a valid assignment. The right to assign the said agreement without prior consent of the defendants was provided for under cl 11 of the CPOA.

Therefore, by virtue of the deed of assignment, the first plaintiff was entitled to enforce the said agreements against the defendants.

[45] The learned judge regarded as trivial the complaint by the defendants that the application to the bank was to be made by the second plaintiff rather than the first plaintiff. This was based on the facts that there was a clear provision in cl 2.1 of the SPCOA that the party seeking to acquire the first defendant's shares in SHS could be the second plaintiff or such person acceptable to the bank. Ultimately, what was crucial was for the bank to approve the said acquisition. Furthermore, there was no statutory provision that determine who must apply. On the facts, the bank's approval was given to the first plaintiff, and it was the first plaintiff who was acquiring the shares from the first defendant. Thus, nothing turned on this argument.

The restitution

[46] The issue of restitution relate essentially to the counterclaim against the plaintiffs on the basis that the option share sale was void. The learned judge found that the issue of restitution under s 66 of the Contracts Act (Act 136) did not apply as the said agreements were not void for illegality and the parties were bound to honour their respective obligations thereunder.

THE APPEAL

[47] In the memorandum of appeal (the MOA), the defendants challenged the learned judge's decision on 21 grounds. We summarised them as follows.

[48] The learned judge erred in law and in fact in not directing that the OS commenced by the plaintiffs be continued as if the cause had begun by writ (paras 3).

[49] The counterclaim. The learned judge erred in law and in fact for failing to allow the defendants' counterclaim against the plaintiffs for restitution and to invoke s 66 of Act 136 to restore the original position of both parties prior to the share sale on the ground that the share sale was void under ss 24 and/or 36(1) and/or 21 of Act 136 (paras 2, 4 and 21).

[50] In relation to the validity of the said agreements, the defendants alleged that the learned judge had failed to consider:

(a) s 67 of Act 553 which prohibited any person from entering into any agreement or arrangement, conditional or otherwise, to acquire and/or dispose of the interests in shares of SHS without the prior written approval of the MOF (paras 5, 6, 8, 10 and 12);

A (b) ss 24, 33 and/or 36 of Act 136 which rendered the contract void, as the prior written approval of the MOF was not obtained by the date stipulated in the CPOA or at all (paras 5–8, 14–15 and 19); and

(c) the intent of the parties and the circumstances of the case shows that the said agreements were entered into without the prior written approval of the bank (paras 7, 11–12 and 14).

[51] The learned judge erred in law and in fact in concluding that the letter from the bank amounted to a prior written approval to the second plaintiff's acquisition and the first defendant's disposal of its interests in the shares of SHS (para 10).

[52] The learned judge erred in law and in fact for holding that the SPOA extended the period to obtain the prior written approval in direct contravention of the CPOA and that the SCPOA purportedly did not have the effect of extending the time to obtain the prior approval, as the CPOA itself was a null and void agreement (paras 16 and 17).

[53] The learned judge erred in law and in fact in not holding that the exercise of the option, the payment of the purchase price and the entry into the SCPOA were void pursuant to s 21 of Act 136 for the parties were under the mistaken belief that the call/put option was valid and subsisting (para 18).

[54] The learned judge erred for holding that the defendants were clearly estopped from claiming that the said agreements were, inter alia, unenforceable, when in fact the plaintiffs had acted in breach of the provisions of Act 553, which is criminal in nature; and to defeat/or override the effect and operation of Act 136 (para 20).

[55] The crux of the defendants' case is that the prior approval of the bank is necessary pursuant to s 67 of Act 553 without which the CPOA and the other related instruments are void for illegality as the plaintiffs, being foreign entities, are not allowed to own 100% in SHS at the material time. It is the contention of the defendants that the transfer of the first defendant's shares in SHS will mean that the first plaintiff will own 99,999 ordinary shares in SHS or 99.999% effective ownership in PAMB. As a result, PAMB would be 100% foreign owned. The defendants contended that these transactions are designed to circumvent the requirements imposed by the law.

[56] The defendants contended in this appeal that the High Court had erred in interpreting s 67 of Act 553 and had failed to appreciate that the plaintiffs had in any event carried the CPOA and the SCPOA into effect without approval.

[57] At the hearing of this appeal, learned counsel for the defendant informed us that the defendants would only rely on one ground, ie the illegality issue resulting in the said agreements entered into being void ab initio. That notwithstanding, we shall attempt to address other issues as well as the issues are rather intertwined.

THE FINDINGS OF THIS COURT

[58] The defendants' case is that a true interpretation of s 67 of Act 553 is a threshold consideration before the High Court and in also this appeal, as the plaintiff's claim hinged on the true interpretation of that provision. The defendants contended that the learned judge had misdirected himself in not having, as a priority, addressed the interpretation issue but went on instead to hold that the case hinged on whether the CPOA is in fact a conditional contract.

[59] Section 67(1) reads:

> 67 Acquisition or disposal of aggregate of five per cent interest in shares
>
> (1) No person shall enter into an agreement or arrangement to acquire or dispose of any interest in shares of a licensee incorporated in Malaysia or of its controller by which, if the agreement or arrangement is carried out, he would, either alone or with any associate, acquire or dispose of to a person, either alone or with any associate, together with any interest in shares of that licensee or of its controller already held by him or previously disposed of by him, as the case may be, an aggregate interest in shares exceeding five per cent of the shares of that licensee or of its controller without obtaining the prior written approval of the Minister, in the case of a licensed insurer, and the Bank, in the case of a licensed insurance broker, licensed adjuster or licensed financial adviser.
>
> (2) No person who has obtained an approval under subsection (1) or who holds more than five per cent of the shares of a licensee or of its controller, shall enter into a subsequent agreement or arrangement to acquire or dispose of any interest in shares of the licensee or its controller without obtaining the prior written approval or the Bank's, as the case may be.
>
> (3) A person intending to acquire or dispose of any interest in shares of a licensee or of its controller under subsection (1) or (2) shall submit his application to the Bank, after which the Bank shall —
>
> (a) In the case of a licensed insurer or of its controller, submit the application, together with its recommendation to the Minister who shall approve or refuse the application; and
>
> (b) (deleted)
>
> Penalty: Imprisonment for three years or three million ringgit or both. Default penalty.

[60] The plaintiff submitted the following. There was no breach of s 67

A and/or that s 67 was not the operable law at the time of the filing of this OS as Act 553 had been repealed on 30 June 2013 by Act 758. There was no breach of the said provision when the said agreements were entered into, as the said agreements were conditional/contingent contracts. Therefore the CPOA was valid and subsisting. The respondent made an alternative submission, ie
B assuming that s 67 is applicable, the learned judge had rightly held that the CPOA and SCPOA are conditional agreements and accordingly, the said agreements are not illegal in any manner.

C **[61]** We shall take up the plaintiff's alternative argument first as this is central to the decision of the High Court.

[62] We are unable to agree with the defendants that the learned judge had taken the wrong approach in not having at the forefront the legislative intent in
D the enacting s 67 of Act 553, but instead placed significant importance on the nature of CPOA, whether it is in fact a conditional contract.

[63] It may well be that the learned judge had chosen to first consider whether the CPOA was a conditional contract. The issue of whether the CPOA
E and SCPOA are conditional agreements is closely related to the illegality issue, the two must be considered together. Having examined the CPOA and the case authorities, the learned judge concluded that on the face of the documents, the CPOA was a conditional contract. He then made his findings that there was no
F infringement of s 67 as the CPOA was enforceable only upon obtaining the approval of the bank on 10 June 2019. Implicit in the question of infringement of s 67 is the issue of illegality.

[64] We make a note however that though there is pronouncement that there
G was no infringement of s 67, the GOJ did not reflect the learned judge interpreting the interpretative issue. We shall undertake that interpreting task.

Conditional contract

H **[65]** As stated by the learned judge, the general position in law is that there is no prohibition in law to make a conditional or contingent contracts. Act 136 makes provisions for such a contract to exist.

[66] Section 32 of Act 136 reads:

I > 32. A 'contingent contract' is a contract to do or not to do something, if some event, collateral to the contract, does or does not happen.

[67] Section 33 of Act 136 provides that once the contingency is fulfilled, the contract becomes enforceable, and it reads:

33(a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

(b) If the event becomes impossible, such contracts become void.

[68] The following terms of the CPOA and SCPOA clearly provide that the said agreements are conditional agreements.

[69] Clause 2 of the CPOA relates to Conditions Precedent. Clause 2.1 of the CPOA states that the obligation of the parties are conditional upon obtaining the requisite approvals. Clause 2.3 states that if the condition is not fulfilled by the cut-off date, this agreement shall be deemed to be terminated and this agreement shall be null and void and of no effect. Clause 2.4 states the Agreement becomes unconditional once the conditions in cl 2.1 are fulfilled.

[70] It is trite law that a contingent or conditional contract is inoperative until the contingency or condition precedent is fulfilled.

[71] In *National Land Finance Co-Operative Society Ltd*, Salleh Abas CJ (Malaya) (as he then was) made the following observation on contingent condition:

> It is therefore obvious that the parties have entered into a of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that contract shall not take effect unless and until the condition is fulfilled (see *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 KB 297, at p 304 — per Denning LJ — and *Property and Bloodstock Ltd v Emerton Bush v Property and Bloodstock Ltd* [1967] 3 All ER 321, at p 330 — per Sachs, LJ). Until the FIC approval was given liability for further performance remained unenforceable, ie suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is in effect laid down by s 33(a) of t which enacts:
>
> > 33(a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> As the approval in this case was refused it means that contingent event becomes impossible and the agreement therefore becomes void in accordance with s 33(b) of the Contracts Act, which is as follows:
>
> > 33(b) If the event becomes impossible, such contracts become void.

[72] In *Gula Perak Bhd,* the question of law revolved on the construction of section of s 214A(1) of the NLC and the implication of a contingent contract. The leave question to be determined reads:

> Whether a sale and purchase agreement to sell estate land to a purchaser wherein it is a condition precedent that transfer of the land will only be effected to the purchaser after and subject to the approval of the Estate Land Board contravenes s 214A(1) of the National Land Code ('the NLC').

[73] Ramly Ali FCJ delivering the majority decision said the following:

> [47] The main thrust of the appeals relates to the SPA dated 28 October 2005 entered into between Gula Perak and Faithmont. Clause 2.1(b) of the agreement had an express term to the effect that Gula Perak, as the vendor shall first obtain the approval of the Land Board before any transfer of the said land can be effected. The Proviso to cl 2.1 provided to the effect that the SPA shall become unconditional on 'the Unconditional Date' ie the last date on which the several matters stipulated in cl 2.1 (a)(b) and/or (c), which include the approval of the Land Board having been obtained. It is also provided in cl 2.1 that if the condition relating to obtaining the Land Board's approval was not fulfilled within the stipulated period, the vendor shall be at liberty to rescind the agreement and thereafter return all monies previously paid by Faithmont to the vendor (which includes the amount of RM5.7m which had been paid to the vendor) and Faithmont as the purchase shall redeliver vacant possession of the land to the vendor. Thereafter the vendor shall be at liberty to resell or deal with the said land as it shall see fit;
>
> [48] Reading the SPA as a whole, it is not in dispute that the agreement was a conditional or contingent agreement, ie conditional upon the approval being obtained from the Land Board for the transfer of the land. Being a conditional agreement, it was not enforceable until all the conditions have been fulfilled. If the conditions are not fulfilled then the said agreement would be of no effect and all monies paid by Faithmont to the vendor were to be returned and vacant possession to be redelivered to the vendor. The agreement shall not take effect unless and until all the conditions are fulfilled (see: Federal Court's decisions in *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211; [1983] 1 MLRA 127; [1983] CLJ 282 and *Khatijah Abdullah & Ors v Mohd Isa Biran* [2017] 2 MLJ 1; [2017] 2 MLRA 509; [2017] 7 CLJ 513; [2017] 2 AMR 341 s 33 of the Contracts Act 1950).
>
> [49] In the present case, the State Authority's consent as well as the Land Board's approval had already been obtained on 20 November 2015 and 29 February 2016 respectively, before the said land was registered and transferred to Faithmont on 23 March 2016.
>
> [50] Section 214A(1) of the NLC does not prohibit the making of a conditional or contingent agreement to sell an estate land which has an express term incorporated in it that the intended sale is subject to the parties obtaining the approval of the Land Board. The prohibition under s 214A(1) is against an act of transfer, conveyance or disposal of estate land without the approval of the Land Board. The SPA being a conditional or contingent agreement is therefore not illegal for non-compliance with the provisions of s 214A(1) of the NLC. Until the approval of

> the Land Board was obtained and the pre-condition was then fulfilled, future performance under the agreement remained unenforceable. The SPA shall not take effect unless and until the condition is fulfilled when the Land Board's approval is obtained. The SPA by itself did not have the effect of transferring or disposing the said land from Gula Perak to Faithmont.
>
> ...
>
> [73] In the upshot, we hold the view that sub-s 214A(1) of the NLC does not prohibit a conditional agreement entered into between parties, so long as the general consensus between them was that no transfer of the said land was to be effected until the Land Board's approval was obtained. The said conditional agreement would not take effect unless and until the condition precedent was fulfilled.
>
> [74] Based on the facts and circumstances of the present case, the SPA in question being a conditional agreement did not contravene sub-s 214A(1) of the NLC and therefore not illegal. It could not be declared null and void. Subsection 214A(1) of the NLC was not intended to bar parties from entering into a conditional SPA involving an estate land. In short, there is no need to obtain an approval of the Land Board first before entering any form of conditional agreement with the intended purchaser involving a sale of estate land.
>
> [75] The conditional SPA in the present case is merely a manifestation of the vendor (Gula Perak) desiring to transfer, convey or dispose of such land to be followed by joint submission with Faithmont to apply for an approval of the Land Board vide an application in Form 14D and as such the said SPA as well as the consent order were within the intent and scope of ss 214A(1) and 214A(4) of the NLC.

[74] We pause here to say that in light of the decision in *Gula Perak*, reliance on *Yakin Tenggara Sdn Bhd v RHB Bank Bhd & Ors and other appeals* [2017] 2 MLJ 774 to support the contention that in the context of contingent contracts involving estate land, it will be against the spirit and policy consideration behind s 214A(1) of the Land Code to allow estate landowners to execute sale and purchase agreements without first obtaining the approval of the land board, is misplaced.

[75] We reject the contention that *Gula Perak*, is authority for s 214A of the NLC and not for Act 553. The crux of the appeal in *Gula Perak*, was in relation to the issue of legality of the SPA (involving estate land) which was a conditional or contingent agreement, very much similar to the issue in this High Court and in this appeal. The proposition of law formulated in the majority judgment in *Gula Perak*, was that a conditional agreement is not illegal. Thus, the learned judge correctly relied on the majority decision of *Gula Perak*, in deciding the problem before him.

[76] In *Maple Amalgamated Sdn Bhd & Anor v Bank Pertanian Malaysia Bhd* [2021] 6 MLJ 348, the Federal Court cited *Gula Perak* with approval. Tengku Maimun CJ held:

A [86] We have ascertained thus far that s 214A is intended to prevent actual and attempted transfers to the extent that it dispossesses the registered proprietor of any legal or equitable interest in the estate land. The raison d'etre of the section is also to prevent fragmentation of estate land. All of this was done to alleviate the plea and plight of indigent estate workers. As gathered from *Gula Perak*, the purpose of the B provision is also not to restrict or limit dealings with estate land as conditional agreements are nonetheless valid if the precondition is such that the Estate Land Board is first obtained.

... Accordingly, we are unable to sustain the appellants' argument that the BBA agreement breaches s 214A and is thus void for illegality.

C

[77] Reference may also be made to *MMI Industries Sdn Bhd*, where the Court of Appeal observed as follows:

The operation of a contract may be subject to a condition precedent. And until the D condition precedent occurs the contract is inoperative. A condition precedent may suspend entirely the formation of the contract or it may not delay formation itself but merely the operation of some, or all, of the obligations under the contract. In *John Pym v Robert James Roy Campbell, James Thompson Mackenzie and Richard Pastor Pritchard* [1856] 6 EI & BI 379, for instance, the court held that prior to the fulfilment of the condition there was no contract in existence ...

E

[78] The first defendant argued that the learned judge failed to appreciate that the plaintiffs had carried the CPOA and the SCPOA into effect despite the bank not having approved the CPOA and the SCPOA. These are the F complaints:

(a) after the second plaintiff made the payments, the second plaintiff took control of SHS in 2009 which effectively means that the second plaintiff owned 100% of the shareholding of PAMB;

G (b) dividends were only paid out to the first plaintiff as a preference shareholder with the approval of the board and shareholders of SHS; and

(c) the first defendant was only holding the shares on trust on behalf of the H plaintiffs.

[79] These complaints are directed to show the performance of the CPOA and the SCPOA by the plaintiffs at the time when there is no approval given by the bank, thus, the so called *de facto* control exercised by the plaintiffs I amounted to an illegal and unenforceable act. The defendants contended that as the plaintiffs took the position that the first defendant was holding the option shares on trust, they therefore did not dispute that they were in control of the SHS. As such, it is not open to the plaintiffs to rely on the CPOA being conditional because by their conduct, it is clear that the plaintiffs had carried

the CPOA into effect and, in so doing, had performed the CPOA without approval. A

[80] Even though these complaints in a way relate to the issue of illegality, we wish to address the same at this juncture to determine whether the averments are sustainable. B

[81] It is crucial to note that the first defendant had voluntarily exercised the put option. There was no documentary evidence to support the defendant's averment that the defendant did not voluntarily exercise the put option and that it was the requirement of the second plaintiff prior to making the payments and the defendants had no choice but to agree to the terms imposed by the second plaintiff. These averments remained unsubstantiated. C

[82] As the first defendant had voluntarily exercised the put option, therefore, all obligations pursuant to the CPOA and SCPOA need to be carried out by the parties. D

[83] In this regard, the learned judge had correctly observed that both parties had intended to see the CPOA and the SCPOA to its completion. It was always the intention of the parties that upon the exercise of the put option, the first defendant was to be paid a percentage of the purchase consideration for the option shares, and this was to be paid even before the bank's approval was obtained. At the risk of repetition, based on the SCPOA and the revised formula, the first defendant had been paid a total sum of RM109,205,290 between 6 May 2009 to 26 July 2019. The approval from the bank was on 10 June 2019. E F

[84] The facts showed that following the exercise of the put option by the first defendant on 15 December 2008, on 9 September 2009, the second plaintiff and the first defendant entered into the SCPOA. G

[85] In cl 1 of the SCPOA, the term 'completion date' was defined to mean the date falling 75 days from the date of the relevant option notice or such later dated as the second plaintiff and the first defendant or as the case may be the Third Party Purchaser may agree in writing. H

[86] Clause 4 of the SCPOA made amendments which we had mentioned earlier, which include the deletion of the 'option price' and the introduction of cl 2 of the SCPOA on the deferment of the completion of the sale of the option share which rendered cll 4.1 to 4.3 no longer applicable. I

[87] Given its significance, we reproduce below cl 2 which provides for

deferred completion:

> 2. Deferred Completion
>
> 2.1 Notwithstanding that DR has exercised the Put Option, as PACL is not for the time being able to complete the purchase of all the Option Shares by reason of the prevailing regulatory government policies in Malaysia relating to foreign shareholding or to procure such person(s) acceptable to the Bank Negara Malaysia ('BNM') to purchase all the Option Shares, the parties hereto agree that the completion of the a purchase of some or all of the Option Shares shall be deferred until such date or dates, without limit in point of time (together the 'Deferred Completion Dates' and each a 'Deferred Completion Date") that PACL is able to complete the purchase or to procure such person/s(acceptable to the BNM to purchase some or all of the Option Shares
>
> PROVIDED THAT: ...
>
> 2.2 Until the final Deferred Completion Date has occurred and payment of the Balance Purchase Price Consideration has been made, DR shall remain the beneficial of the option Shares then held by it from time to time and PACL shall and hereby irrevocably and unconditionally authorised by DR to complete the transfer form or forms with the details of the transferee being PACL, or such person or persons as PACL may direct and do all such acts and things as may be necessary to transfer the Permitted Option Shares to PACL or to person(s) as may be nominated by PACL on the on the Deferred Completion Date. On the Deferred Completion Date, DR shall, at the request of PACL, execute al such instruments and do all such acts and things as may be necessary to transfer the Permitted Option Shares to PACL or to such person(s) as may be nominated by PACL.

[88] Pursuant to cl 2.3 of the SCPOA, it was also agreed by the first defendant that pending the completion of the share transfer, the first defendant shall not dispose of or grant any option, interest or right over or in the option shares to any third party or to deal with the option shares.

[89] Having mutually agreed to defer the completion date and pursuant to the revised methodology for the purchase consideration contained in cll 2.1.1 to 2.1.3 of the SCPOA, the first defendant was paid an initial payment of RM69.3m. It is to be noted that there was no initial payment envisaged under the original formula agreed in the CPOA.

[90] The revised formula under the SCPOA provided that the first defendant would be paid the balance payment by way of instalments at three year intervals. As a matter of interest, the periodical payments were however shortened to an interval of 18 months instead of 36 months since 2016, to accommodate the request made by the first defendant evident from the first defendant's representative email dated 13 October 2016.

[91] It is a point to note that from 15 December 2008 when the first defendant issued the put option notice to 30 April 2018 when the defendants stated that they wished to rescind the put option exercise, the first defendant admitted that they had to date received from Prudential Groups an aggregate sum of about RM103m being initial deposit and part payment of the purchase consideration and payment period instalments from May 2009 to date.

[92] After the letter dated 30 April 2018, the defendant continued to receive the sum of RM 5,684,396 on 26 July 2019. Reference is made to paras 43–47 of the affidavit in support where the plaintiffs had tabulated the payments that were made to the first defendant, and para 55 of affidavit in reply by the defendant where the defendants admitted to have received the payments.

> 55. I further state that the payments made by the second Plaintiff are in contravention of the applicable regulations and as such I am advised by the Defendants solicitors and verily believe that the said payments do not amount to valid consideration.
>
> 56. I am further advised by the solicitors for the Defendants and verily believe that the payments should not have been paid until and unless the approval from the regulators have been received, sanctioning the agreement between the parties. The sanction can only be provided if the shareholding ownership (directly and indirectly) in Prudential Malaysia does not contravene the applicable laws and regulations and public policy.

[93] It is also crucial to observe that despite the position taken in the letter dated 22 July 2019, the first defendant continued to receive the payment of RM5,684,396 on 26 July 2019. This was after the bank had given its approval on 10 June 2019.

[94] In the circumstances, we are in agreement with the plaintiffs that the defendants' contentions that the agreement by the second plaintiff to make payment to the first defendant illustrated the fact that the second plaintiff was prepared to circumvent the laws of Malaysia by making the payments, is unreasonable and unwarranted.

[95] On the issue of trust, we are in agreement with learned counsel for the plaintiffs that as the majority shareholder of SHS holding 51% shares, the first plaintiff has control of SHS and that the holding of the option shares on trust is permissible under the law and does not render the CPOA and SCPOA illegal as the option shares remain in the name of the first defendant.

[96] In this connection, the decision of the Federal Court in *Maple Amalgamated*, is instructive:

> [72] The undisputed fact remains in this case that there has been no actual transfer of ownership of the land from the first appellant to the respondent. No

memorandum of transfer was executed and the first appellant remained the registered proprietor of the land at all material times. Even if the BBA agreement purports to vest beneficial ownership in the respondent, it is clear that in fact no such vesting ever took place. The respondent never in law or in equity became the owner of the land as the arrangement was merely a means to finance an Islamic facility. Our courts have held that Islamic financing facilities transacted in this way, for example the BBA in this case, are valid and are recognised financial transactions (see *Dato' Hj Nik Mahmud Daud v Bank Islam Malaysia Bhd* [1998] 3 MLJ 393; [1998] 3 CLJ 605).

[73] Accordingly, we agree with the respondent that the BBA agreement is not caught by the terms of s 214A of the NLC.

[97] Similarly here, the first defendant was holding the option shares on trust on behalf of the plaintiffs. The option shares remain in the first defendant's name to date.

[98] The defendants did not dispute the MOA and the SMOA. The defendants' affidavit evidence showed that these two instruments were made as the second plaintiff had agreed to make payments to the first defendant. The defendant contended that these two instruments are nothing more than a security provided to the second plaintiff as described in the MOA. But the contenst of the MOA and the SMOA are telling of the commitments the defendants had agreed to be binding on them.

[99] The MOA was entered into between the parties as a further security for the performance of the obligation under the CPOA, ie SHS paying all monies due or accruing to the second plaintiff as chargee. Clause 3.3 of the MOA granted the second plaintiff the right to execute the transfer form and effect the transfer of the option shares any time without notice to the chargor or shareholders and without the chargor's or shareholders' consent. Clause 3.3 reads:

> 3.3 Notwithstanding anything to the contrary herein contained, the Chargee shall as additional collateral security for the Obligations have the right at any time without notice to the Chargor or Shareholders and without the Chargor's or Shareholders' consent complete the blank transfer forms deposited with the Chargee under this Memorandum and effect the transfer of the Shares to the Chargee or any other person as the Chargee or any other person the Chargee may deem fit.

[100] By cl 7.1(i) of the MOA, the first defendant was not allowed to deal with their 49% shareholding in SHS and prohibits the second defendant and Tunku Shahabuddin from dealing with their shareholdings in the first defendant, without the prior written consent of the second plaintiff. Clause 7.1 reads:

7.1 Each of the Chargor and the Shareholders hereby undertakes with the Chargee that:-

(i) save with the prior written consent of the Chargee, it or he will not (and will not agree conditionally or unconditionally, to) assign, transfer or otherwise dispose of, or create (or agree) conditionally or unconditionally to create) or have outstanding any security on or over any of the Shares and/or the Chargor Shares, as the case may be, or any interest in the Shares and/or the Chargor Shares, except for the security created by the charge under this Memorandum;

[101] On 9 September 2009, when the parties executed the SCPOA, the second plaintiff as the chargee, the first defendant as the chargor, the second defendant and Tunku Shahabuddin similarly executed the SMOA as a condition of the second plaintiff entering into the SCPOA and as security for the first defendant repaying the secured sums.

[102] As mentioned, by virtue of cll 2.1 and 2.2 of the SMOA, a further charge was created over the 49,000 ordinary shares in SHS in favour of the second plaintiff, and that if the first defendant were to be wound up before the completion of the put option exercise, the secured sums is to be immediately repayable to the second plaintiff. As the learned judge put it, this essentially placed the defendants in a position of trust as they were holding the shares for the benefit of any entity deemed appropriate by the second plaintiff and the bank.

[103] The defendants' argument that there was no basis for the second plaintiff to rely on the MOA or the SMOA as there can be no valid trust in the circumstances of this dispute as the put option notice has been rescinded and the CPOA and SCPOA not completed, is devoid of merit. Recital D to the SMOA fortified the learned judge's finding that the defendants were put in a position of trust. It reads:

(D) As a condition of the Chargee entering into the Supplemental Agreement and as security for the Chargor repaying the Secured Sums (as defined below) if the Chargor were to go into liquidation prior to the Final Deferred Completion Date, the Chargor and each of the Shareholders intend to enter into this Supplemental to inter alia secure the repayment of the Secured Sums (as defined in Clause 3.1.1 below by creating further security over the Shares and to make certain corresponding amendments to the Principal MOD.

The argument in any event cannot hold water as there was no rescission of the CPOA and the SCPOA.

[104] Finally, on the issue of dividends, the first defendant claimed that they did not receive any dividends from SHS since the second plaintiff took control of SHS in 2009.

[105] The plaintiff at the other end contended that SHS has only declared and paid interim dividends to the first plaintiff as the preference shareholder, pursuant to resolutions approved by the board and shareholders' of SHS. This was in accordance with article 113 of SHS's constitution that no dividends can be paid out without first obtaining the board and shareholders approval. The defendant had voluntarily approved all board and shareholder resolutions of SHS for only the preference shareholder to be paid dividends. The learned judge had dealt with this issue. We find no error in his observation that the defendants' claims were unsubstantiated and devoid of merits. By its conduct, the defendants should be estopped from raising this issue.

[106] We conclude by saying that the aforementioned clearly demonstrate that both parties had consistently conducted themselves in accordance with the arrangements and understandings reached between them on the basis that the CPOA was valid when the put option was exercised, and that both parties had intended to see the CPOA and the SCPOA to its completion subject to the bank's approval being obtained.

[107] Thus, the defendants' complaints are without basis.

The illegality issue

[108] We shall proceed to consider whether cl 2.1 of the CPOA was in accord with the legislative intent of s 67 of Act 553. This is the illegality issue.

Non-application of s 67 of Act 553

[109] The arguments advanced by the plaintiffs on this issue are as follows.

[110] Firstly, Act 553 has been repealed by Act 758. Thus, s 67 is no longer applicable. Further, Act 553 specifically made reference to controller of a licensee, which on the facts here refers to SHS. However, s 87 of Act 758 has completely omitted all reference to 'controller of a licensee', which was previously mentioned in s 67.

[111] Secondly, it is trite law that the applicable law which exist at the date of the hearing is relevant, and not such law which exist when the said agreements were executed. Reference was made to *Che Esah & Anor v Che Limah* [1966] 1 MLJ 36 (FC), *Government of Malaysia v Zainal bin Hashim* [1977] 2 MLJ 254b (FC) and *Quilter v Mapleson* (1882) 9 QBD 672. Therefore, s 67 is not applicable to the OS as it was repealed long before the OS was filed.

[112] Thirdly, under Act 758, the approval of the bank is no longer required for the acquisition of the first defendant's 49% shares in SHS, as SHS is not a licensed person but was a controller of the licensee which is PAMB. Thus, the defendants' contention that s 67 prohibited parties from entering into the said agreements without obtaining the prior written approval, and therefore, the said agreements are all void, are premised on a misconceived position of the law. In this regard, s 270 of Act 758 makes it clear that no agreement shall be rendered void solely on the basis of any contravention of the provisions of the Act, unless the Act expressly provides as such.

[113] We were informed by learned counsel for the plaintiffs that this non-application issue was not raised before the learned judge. However, we shall attempt to address the matter as it is on point of law and in view of the fact that both parties had submitted on it.

[114] We agree with learned counsel for the defendants that the governing law in this dispute should be s 67 of Act 553 when all instruments were executed.

[115] By reason of the repeal of Act 553, s 272 of Act 758 provides for savings and transitional provisions. It is pertinent to note the following paragraphs:

> 272 Notwithstanding section 271 —
>
> (a) ...;
>
> (b) ...;
>
> (c) any application for a licence, approval, authorization, notification, acknowledgment, consent, permission or for any other purpose whatsoever made by any person under the repealed Acts before the appointed date and pending before the appointed date, shall —
>
> (i) if there is a corresponding provision in this Act or in any direction issued under subsection 214(6) or section 216, be dealt with as if it was made under that provision;
>
> (ii) if a different provision has been made for the application under this Act or in any direction issued under subsection 214 (6) or 216, be dealt with in accordance with such provision; and
>
> (iii) ...
>
> (l) any right , benefit, privilege, obligation or liability acquired, accrued or incurred under the repealed Acts, shall continue to remain in force under this Act; and.

[116] It will be seen from the above that para (c) does not apply to the plaintiff as the application for the approval of the bank was only made in April 2018, ie after Act 758 came into force on 30 June 2013. Thus, there was no pending

application. It is para (l) which preserved the right, benefit, privilege, obligation or liability acquired, accrued or incurred under the repealed Acts, that applies to this case.

[117] We also agree with learned counsel for the defendants that relying on *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749; [2014] 1 CLJ 207 (FC) and *Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals* [2020] 1 MLJ 311 at p 338; [2020] 1 CLJ 193 (FC), as Act 758 made no express provision on retrospective effect, thus the statute should not be interpreted retrospectively.

[118] In *Ireka Engineering*, the issue to be determined by the Federal Court was whether the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') which came into force on 15 April 2014 is retrospectively applicable to a subcontract that was signed and dated prior to the enforcement date, or will it render the entire adjudication proceedings, including the adjudication decision, void? Idrus Harun FCJ held:

> [71] From the above authorities, it is clear to us that in the absence of express words to such effect, a statute, notwithstanding whether it is procedural or substantive, cannot be applied retrospectively to impair a substantive right. This settled legal position, we would say, accords well with and further amplifies those statutory provisions of the interpretation statute namely Act 388. To reiterate our point, what is important to note is that the CIPAA in itself does not contain any provision stating that it has retrospective application. Parliament therefore clearly does not exercise its legislative power pursuant to art 66 cl (5) of the Federal Constitution and sub-ss 2(3), 19(1) and 43(a) of Act 388 to enact the CIPAA with retrospective effect.

[119] Similarly, as Act 758 in itself does not contain any provision stating that it has retrospective application, thus the provisions of the law cannot be applied retrospectively.

CPOA void for illegality?

[120] To recapitulate, the defendants contended that at the time the CPOA was entered into, there was a prohibition of a 100% ownership of insurance companies under s 67 of Act 553 and thus a prior approval of the bank was therefore required to enter into the CPOA. Since the bank's approval was not obtained prior to the making of CPOA, thus the CPOA was void for illegality under s 24 of Act 136 as it was in breach of s 67 of Act 553.

[121] It was also submitted that the requirement of prior written approval was necessarily a condition precedent to the formation of the agreement between the parties, and not to performance. If it is otherwise, the phrase 'enter into' in s 67(1) of Act 553 would be rendered otiose, with the consequence that

Parliament would have legislated in vain. Therefore, the learned judge had failed to ask himself whether the condition precedent of the bank's approval was a condition precedent to the formation of the contract between the parties.

[122] In interpreting s 67(1) of Act 553, learned counsel for the appellant submitted rather extensively on:

(a) the legislative intent underlying s 67 of Act 553 which was contained in Part VI of Act 553. Excerpts of the Hansards on the speech of the then Deputy Minister of Finance during the tabling of the Insurance Bill was reproduced to us. It was submitted that the underlying purpose was to ensure that acquisitions and disposals were not injurious to insurance companies, particularly with respect to the financial status, given the importance of the insurance industry to the wider public;

(b) the applicable principles of statutory interpretation. In this regard, learned counsel submitted that provision of a statute has to be interpreted purposively with reference made to s 17A of the Interpretation Acts 1948 and 1967 (Act 388). A purposive construction can nonetheless require the application of the literal meaning of words and phrases if this is what such a construction requires; and

(c) the functions and powers of the bank under Act 533.

Construction of s 67 of Act 553

[123] On the construction of s 67 of Act 553, the defendants submitted that the context of the phrase 'enter into' in s 67(1) leaves no room for doubt that the intention of Parliament is that the phrase to be understood literally, ie approval is to be obtained to enter into an agreement of the nature specified.

[124] As regards the phrase 'carried out' used in s 67(1), the defendant submitted that had Parliament intended the phrase 'enter into' to mean 'carried out', it would have used the latter phrase instead of the former. The fact that Parliament used both phrases in the same provision necessarily points to Parliament having intentionally used the phrase 'enter into' when defining the obligation s 67(1) created.

[125] The plaintiffs submitted that the defendants' interpretation on the phrase 'enter into' in s 67 is misconceived as they failed to consider the effect of the phrase 'if carried out' appearing in the same sentence. When read together, it is clear that the prohibition is against the carrying out of the transaction ie its implementation without obtaining the bank's approval and not by the mere execution of a conditional contract such as the CPOA and SCPOA.

[126] The plaintiff submitted that on the facts here, the literal meaning of s 67

is clear and the purposive interpretation is not required. However, learned counsel submitted that the interpretation of s 67, be it in its literal or purposive meaning, did not lead to a conclusion that the said section prohibits the making of a conditional contract where the enforceability of such contract is made contingent on the requisite approval being obtained. Hence, even if a purposive interpretation is to be applied in interpreting s 67, such an interpretation would not lead to an interpretation that s 67 required the approval to be obtained prior to entering into a conditional contract.

[127] It is apparent from the submissions presented to us that both parties are persuading us to embark on the literal approach in construing s 67. We have considered all submissions and the high authorities submitted by learned counsels in support of their respective contentions as to what is to be the true construction of s 67.

[128] A few words need to be said on the rules of construction.

[129] In the latest decision of our Federal Court in *Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain* [2022] 3 MLJ 450; [2022] 4 CLJ 657, the apex court held that any reading which is purely textual, as opposed to contextual, is to be rejected pursuant to s 17A of the Interpretation Acts 1948 and 1967 (Act 388). In other words, it was held that with the introduction of s 17A of Act 388, which is statutory in nature, the method of statutory construction was changed in that the purposive rule of construction prevails over the literal rule of construction. Delivering the unanimous decision of the Federal Court, Nallini Pathmanathan FCJ held as follows:

> [49] We have previously concluded that the AMLR has statutory force. As such the provisions of the AMLR should be construed within the purview of, and in accordance with the principles and objectives of the CMSA. This is particularly so given that the CMSA comprises the source of the AMLR. In order to do so, it is necessary to first, construe the CMSA, the statutory interpretation of which is governed by s 17A into the Interpretation Acts 1948 and 1967.
>
> [50] Malaysian law requires that the interpretation of an Act be undertaken with the purpose and object of the Act in mind. Section17A of the Interpretation Acts 1948 and 1967 provides as follows:
>
> > In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.
>
> Please see also *Tebin Mostapa v Hulba-Danyal Balia & Anor* [2020] 4 MLJ 721; [2020] 7 CLJ 561 ('*Tebin*'s case').
>
> [51] It is clear from the wording of s 17A that any reading which is purely textual, as opposed to contextual, is to be rejected.

[130] In *AJS v JMH and another appeal* [2022] 1 MLJ 778; [2022] 1 CLJ 331, a case decided before *Bursa Malaysia*, the majority of the Federal Court held that the standard canon of construction has always been that the courts should, in usual cases, begin with the literal rule and that the purposive rule only ought to be relied on where there is ambiguity. A

B

[131] What happen when there are conflicting decisions of the Federal Court in relation to the same subject matter?

[132] The on-point case is the landmark case on stare decisis that is *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 at p 14. One of the issues before the Federal Court was when there are conflicting decisions of the Federal Court, whether the lower court may refuse to apply the latest decision of the Federal Court and adopt an earlier decision of the Federal Court. The Federal Court unanimously held that when two decisions of the Federal Court conflict on the same point of law, the subsequent Federal Court decision prevail over the earlier Federal Court decision. C

D

[133] Premised on *Dalip Bhagwan Singh*, *Bursa Malaysia*, being the latest judgment of the Federal Court, portrays the current law.

E

[134] In addition, it is also observed that there is no mention in *Bursa Malaysia*, that a particular case (in this context, the case in question is *AJS*, and other relevant cases) was overruled by virtue of the decision in *Bursa Malaysia*. However, the legal proposition as enunciated in *Dalip Bhagwan Singh,* is crystal clear that when two decisions of the Federal Court conflict on a point of law, the later decision therefore, for the same reasons, prevails over the earlier decision. F

[135] Thus, we are bound by the doctrine of stare decisis to follow *Bursa Malaysia*. G

[136] When the purposive approach is applied, we find that the interpretation by the defendants cannot be sustained. In this regard, we agree with learned counsel for the plaintiffs that in the context of s 67 of Act 553, the words 'enter into' must be read together with the effect of the words 'if carried out'. When read together, it is clear that the prohibition is against the carrying out of the transaction ie its implementation without obtaining the bank's approval and not by the mere execution of a conditional contract such as the CPOA and SCPOA. The prohibition is not against the entering into a contract, but which if the contract is carried out, it would lead to an acquisition or disposal of more than 5% shares of a licensee without the prior approval of the bank. H

I

[137] Both parties have made references to the Hansard. We reproduce below

A the relevant and pertinent excerpts of it:

> Tuan Yang di-Pertua, Rang Undang-Undang Insurans 1996 telah didraf dengan objektif serampang dua mata iaitu memberi Bank Negara Malaysia kuasa pengawalseliaan yang cukup di samping memberi ruang yang mencukupi kepada industry insurans untuk berinovatif dan berkembang dengan cara yang tersusun.
>
> B Peruntukan rang undang-undang menerimapakai rejim kawalan dalam Akta Bank dan Institusi-institusi Kewangan 1989 (ABIK) dengan tujuan untuk memperkuatkan lagi pengawalseliaan Bank Negara Malaysia ke atas industry insurans dan membuatkan pelaksanaan kuasa, tugas dan fungsi statutorinya lebih berkesan. Untuk memastikan penanggung insurans mematuhi
> C peruntukan-peruntukan rang undang-undang ini, hukuman yang lebih berat adalah dicadangkan. Rang undang-undang akan mengawal selia keseluruhan operasi penanggung insurans yang diperbadankan di Malaysia berbanding dengan Akta yang cuma terpakai ke atas operasi perniagaan insurans dalam Malaysia sahaja.
>
> Bahagian VI rang undang-undang memperuntukkan bahawa tiada seorang pun
> D boleh memasuki sebarang perjanjian untuk memperolehi atau melupuskan sebarang kepentingan dalam syer pemegang lesen atau pengawal sekiranya ia dilakukan, ia akan memperolehi atau melupuskan agregat kepentingan syer melebihi 5% daripada syer pemegang lesen tanpa mendapat kelulusan bertulis terlebih dahulu daripada Menteri Kewangan dalam hal penanggung insurans dan
> E daripada Bank Negara Malaysia dalam hal broker insurans atau adjuster.

[138] We are mindful of the extent reliance can be made on Hansard in construing a statute. As observed by Tengku Maimun CJ in *Maple Amalgamated Sdn Bhd*, Hansard is merely a starting point on interpretation
F and not the end-goal. However, the Hansard in this particular instance, clearly show that 'tiada sesiapa pun boleh memasuki sebarang perjanjian ... sekiranya ia dilakukan ia akan memperolehi atau melupuskan. What is the legislative intent behind the enactment of s 67 is that approval from the bank must be obtained if the agreement entered into will lead to the acquisition or disposal of
G the share. Thus, in our view, the prohibition is not against the entering into of a contract. The prohibition is against the carrying out of the contact which will lead to the acquisition or disposal of more than 5% shares of a licencee without the prior approval of the bank. It is our judgment that the CPOA was valid even though approval was not obtained prior to its execution.

H

[139] The learned judge placed considerable reliance on *Hartaya.* We think this is a case on point. The issue in this case is similar to the present case ie whether a conditional agreement made requiring the approval of the MOF to be obtained pursuant to the then s 49(1)(b) of the Banking and Financial
I Institutions Act 1989 ('the BAFIA'), was valid although the approval was not obtained prior to the execution of the agreement.

[140] The learned judge in the court below had canvassed *Hartaya* at length and we do not intend to repeat. Suffice for us to note the following. The

decision of the High Court in *Hartaya* turned on the phrase 'proposed agreement' under s 49(2) of the BAFIA which makes reference to a 'proposed agreement'. The parties must first apply to the Minister by sending a proposed agreement and the relevant information to enable the Minister to make a decision.

[141] It is correct to say that s 67(1) of Act 553 makes no reference to a 'proposed agreement' as can be found in s 49(2) of the BAFIA. Be that as it may, s 67(3) of Act 553 provides that a person 'intending to acquire or dispose of any interest in shares' of a licensee or of its controller under sub-s (1) or (2) shall submit his application to the bank for the bank to make its decision. Section 67(3) reads:

> (3) A person intending to acquire or dispose of any interest in shares of a licensee or of its controller under subsection (1) or (2) shall submit his application to the Bank, after which the Bank shall:
>
> (a) in the case of a licensed insurer or of its controller, submit the application, together with its recommendation to the Minister who shall approve or refuse the application; and
>
> (b) in the case of all other licensees or their controllers, approve or refuse the application.

[142] From the reading of s 67 of Act 553 in its context, it is our view that the application for the prior written approval of the bank mentioned in sub-s (1), is to be made under sub-s (3). The application for the prior written approval of the bank is to be made by 'a person intending to acquire or dispose of any interest in shares of a licensee or of its controller sub-s (1) or (2)', and in our case, it is sub-s (1). The application envisaged by sub-s (3) is an application for approval to 'acquire or dispose of any interest in shares'. The application envisaged by sub-s (3) does not refer to 'an agreement or arrangement to acquire or dispose of any interest in shares' entered into under sub-s (1). Thus, it is manifestly clear that from the proper reading of sub-s (3), which in turn makes no mention of or reference to the entry of 'an agreement or arrangement to acquire or dispose of any interest' in sub-s (1) and in the context of s 67, a prior written approval of the bank is not a condition precedent before the entry the CPOA.

[143] The words 'intending to acquire or dispose' must be given their meanings in the context of s 67 as it is trite that the legislature does not act in vain. In the present case, as we had narrated earlier, the parties had entered into the COPA and the SCPOA with the intention that the first plaintiff would be the person intending to acquire the 49% shareholding of the first defendant.

[144] Adopting a purposive approach, and bearing in mind that a conditional agreement does not take effect unless the condition precedent is fulfilled, it is logical to assume that there would have been an agreement between the parties, in this case the CPOA and the SCPOA, to complete all the mutual obligations pertaining to the purchase of the option shares with the first plaintiff being the person intending to acquire the shares subject of course to the approval of the bank. Only then the first plaintiff submitted his application to the bank pursuant to sub-s (3), after which the bank shall approve or refuse the application under para 67(b). Thus, the prior written approval that is required to be obtained comes later, not at the time the CPOA was entered into.

[145] The procedural steps taken by the parties in the present case are similar to the procedural steps spelt out in *Vellasamy a/l Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN 35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) v Gurbachan Singh a/l Bagawan Singh & Ors* [2010] 5 MLJ 437; [2009] 5 MLRA 447; [2012] 2 CLJ 712.

[146] In *Gula Perak*, the majority decision accepted with approval the procedural steps laid out by the majority decision of the Court of Appeal in order to comply with the requirements of s 214A of the National Land Code ('the NLC'), as shown in the passages below:

> [67] We are in agreement with the majority decision of the Court of Appeal in *Vellasamy a/l Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN 35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) v Gurbachan Singh a/l Bagawan Singh & Ors* [2010] 5 MLJ 437; [2009] 5 MLRA 447; [2012] 2 CLJ 712 which held, inter alia, that s 214A(1) of the NLC does not prohibit the execution of a conditional agreement for sale of estate land. We share the same sentiment with the Court of Appeal in that case as pronounced below:
>
> [68] The procedural steps that need to be taken for parties to comply with the requirements of s 214A of the NLC involving any transfer of estate land had been correctly laid out by the Court of Appeal in *Vellasamy* case, (with which we agree) as follows:
>
> > The rigmarole to comply with the provisions of s 214A of the NLC would be as follows. Firstly, the parties have to enter into a sale agreement. Secondly, when the parties have completed all the mutual obligations under the contract, then they are ready to transfer the property. Thirdly, it is at this point of time, that the parties apply for the statutory consent. Fourthly, after obtaining the statutory consent, the land is duly transferred and registered in the name of the purchaser. However, a caveat must be incorporated. If and only if for some reason the statutory consent is refused, then the sale will fall through.

[147] In our view, s 67 must also be read in light of s 68. Section 68 provides for power granted to the bank to make certain prohibition and restriction in the event of a contravention of s 67. The bank is empowered under this section

to make a preliminary order imposing all or any of the prohibitions or restrictions as prescribed therein, in respect of a share which is the subject of contravention of s 67. The construction of s 68 expressly show that the offence committed under s 67 relate to the acquisition or disposal of the share, not proposed acquisition or disposal of the share.

[148] Thus, in our view, the prohibition in s 67 is not by the mere execution of a conditional contract such as the CPOA and SCPOA but against the carrying out of the transaction without obtaining the bank's approval. A contravention under s 67 occurs if the CPOA and the SCPOA are carried out leading to an acquisition or disposal of more than 5% shares of a licensee without the prior approval of the bank. The plaintiff will face prosecution under s 67 and also the enforcement of s 68. Even if there be no prosecution under ss 67, 68(12) enables the bank to invoke its powers to make the preliminary orders under s 68(1). In the final analysis, the issue of any contingent contracts being rendered void does not arise so long as the acquisition or disposal does not take place until the fulfilment of the conditions. This in our view, is the true construction of s 67.

[149] It is on this true construction that we witnessed what had taken place in this case. The bank, after receiving the application by the first plaintiff in April 2018 made pursuant to sub-s (3), approved the application in principle in May 2018 and approved the proposed acquisition on 10 June 2018.

[150] We reproduced paras 2, 3 and 4 of the said letter dated 10 June 2019:

> 2. The Bank had received an application from Prudential Corporation Holdings Limited (PCHL) in April 2018 to acquire 49% effective interest in shares in PAMB from Detik Ria Sdn Bhd (DRSB) where the Bank was informed that:
>
> (a) DRSB had, in 2008, exercised an irrevocable put option where PCHL was required to purchase DRSB's indirect equity interest in PAMB;
>
> (b) following such exercise, the parties entered into a Supplemental Call/Put Option in 2009 to defer the completion date of the transfer until such time the Bank's approval is granted; and
>
> (c) DRSB has received part payment for such put option shares.
>
> 3. Based on the above representations, the Bank had conveyed its approval in principle to PCHL in May 2018 to acquire DRSB's 49% effective interest in shares in PAMB through Sr Han Suria (SHS). The Bank has since received a subsequent application from PCHL to compete the acquisition of DRSB's 49% effective interest in shares in SHS in PAMB with immediate effect to which the Bank has no objection.
>
> 4. In June 2018, DRSB wrote to inform the Bank that DRSB takes the position that it is a 49% shareholder in SHS which holds 100% interest in PAMB and intends to

A maintain such shareholding. In the same letter, DRSB had conveyed that DRSB was in discussion with PCHL in relation to this.

In view of the above, we expect both DRSB and PCHL to resolve this issue expediently and update the Bank of the outcome by 1 July 2019.

B **[151]** It is crucial to note from the bank's letter, bearing in mind the speech of the Deputy Minister on the emphasis he made as regards the role and functions of the bank as regulators responsible for the carrying out of the licensing and regulations of insurance business as intended by Parliament and thus vested with the jurisdiction to deal with any infringement of the law, is the fact that C the bank did not take any issue as to why the plaintiffs had not obtained prior written approval when executing the CPOA and SCPOA. Had there been an offence committed for failure to obtain their prior approval as contended by the defendants, the bank would not only have rejected the application by the first plaintiff but at the same time, had the plaintiffs prosecuted for failing to D comply with the provisions of s 67 of Act 553 or resorted to s 187(1) of Act 553. It is to be borne in mind that the contravention of s 67 attracted severe penal sanctions of imprisonment for three years or RM3m fine or both. The bank could have also invoke its powers under s 68 to impose any prohibition or restriction on the shares concerned. All these did not happen because s 67 does E not impose prohibition for the entry of an agreement like CPOA for the bank to go after the plaintiffs. Section 67 is concerned with the acquisition or disposal of any interest in shares. In the present case, the acquisition and/or the disposal of the 49% share has not taken place and the first plaintiff was by its application in April 2018, was seeking the bank's approval to do the very thing. F

[152] In our judgment, the bank's letter was, in its context, a written approval for the transaction reflected in the CPOA within the meaning of s 67.

G **[153]** The defendants in this case disputed the validity of the bank's approval letter, alleging, inter alia, that the approval from the bank did not take into account the fact that the second plaintiff had made the payments to the first defendant at the material time when there was a prohibition for the second plaintiff to have 100% ownership of PAMB. And the bank did not consider the H validity of the said agreements on the fact that the plaintiffs had taken control of SHS prior to issuing the purported approval letter.

[154] We are of the view that allegations are not tenable.

I **[155]** It is pure conjecture for the defendants to now make such allegations. The defendants did not make the bank a party to the dispute between the parties. The bank's letter was sent to both sides. The defendants could have communicated their objections or reservations or sought clarifications over the approval if they were of the view that the bank had not considered the

implication of the approval, or that the first plaintiff was not entitled to make an application to the bank in April 2018. They could have also filed a judicial review application to challenge the approval granted to the first plaintiff. None was done. Therefore, the defendants lack legal basis to mount any challenge on the bank's approval.

[156] It is misconceived to even suggest that the bank had no full knowledge of the said transaction. The defendants had obviously missed the point that the bank had actually asked the parties to resolve their disputes and to revert to the bank on the outcome.

[157] We are in agreement with learned counsel for the plaintiffs that the bank's letter showed that 100% foreign ownership in a Malaysian insurance company was permissible.

[158] In this connection, it is significant to note the bank's press release titled 'Liberation of the Financial Sector'. We reproduce the relevant excerpt of the press release below:

> 3. With immediate effect, to further strengthen the resilience and competitiveness of the insurance and takaful industry, insurance companies and takaful operators are given greater flexibility to tie-up with foreign partners. Accordingly, the foreign equity participation in insurance companies and takaful operators will be increased to a limit of up to 70%;
>
> 4. A higher foreign equity limit beyond 70% for insurance companies will be considered on a case-by-case basis for players who can facilitate consolidation and rationalisation of the insurance industry. Existing foreign insures that participate in the process will be accorded flexibility in meeting the divestment requirement.

[159] The above excerpt clearly states that any foreign shareholding in an insurance company in excess of the 70% limit will be considered by the bank on a case to case basis. Therefore, 100% foreign ownership of a Malaysian insurance company is permitted in Malaysia on a case to case basis provided the bank's approval is obtained.

[160] Learned counsel for the defendants referred us to the provision of s 45(1) of the BAFIA where the words 'is carried out' and the words 'enter into' are used. These words came under consideration by the Supreme Court in *Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor* [1994] 1 MLJ 369; [1994] 2 CLJ 143 (SC). The defendants submitted that the Supreme Court concluded that a contract that contravened the prior approval requirement in s 45(1) of the BAFIA was void and unenforceable. Thus, the CPOA was not a valid agreement.

[161] Section 45(1) reads:

45 Acquisition or disposal of aggregate of five per centum holding

(1) Without prejudice to sections 49 and 50, and subject to section 46, no person shall enter into an agreement or arrangement to acquire or dispose any interest in the shares of a licensed institution by which, if the agreement or arrangement is carried out, he would —

(a) acquire, together with any interests in the shares of that institution which were then already held by him, or by him and by persons acting in concert with him; or

(b) dispose, together with the interests in shares previously disposed by him to any single person or any persons acting in concert, to such single person or such persons acting in concert,

an aggregate interest in shares of not less than five per centum of the shares of that institution, without obtaining the prior written approval of the Minister to enter into such agreement or arrangement:

[162] Edgar Joseph Jr SCJ in *Coramas* said at p 379 (MLJ):

In the present case, s 45(1) expressly prohibits any person from entering into any agreement or arrangement to acquire or dispose any interest in the shares of a licensed institution of the kind defined therein without obtaining the prior written approval of the Minister of Finance. The Act goes on to provide by s 103(1) read with the Fourth Schedule, item 59, that any person who contravenes the provisions of s 45(1) commits an offence and shall on conviction be liable to imprisonment not exceeding five years or a fine not exceeding RM5 million or with both such imprisonment and fine.

We were therefore driven to the inevitable conclusion that the alleged agreement of 14 December 1989, had contravened s 45(1) of the Act, and being an act or undertaking which was forbidden by law in that it violated a prohibitory enactment of the Legislature it was by reason of s 24 of the Contracts Act void.

[163] The learned judge had considered this case and held that the case did not apply as the facts were distinguishable. *Coramas* did not deal with the issue of conditional or contingent contract as in the present case. And despite s 45 requiring the prior written approval of the bank, the approval of the bank was never obtained. We have no reason to disagree with the learned judge.

[164] The learned judge had also considered the cases submitted by the defendants namely *Ace Ina International Holdings Ltd v Advance Synergy Capital Bhd* (D-24-NCC–72 of 2009) (unreported), *Malayan Banking Bhd v Neway Development Sdn Bhd & Ors* [2017] 5 MLJ 180 and *Tan Chee Hoe Sdn Bhd v Code Focus Sdn Bhd* [2014] 3 MLJ 301; [2014] 3 CLJ 141. We think the learned judge was correct in his findings that these cases were all related to contravention of statutes, which is not the case here.

[165] As the entire transaction in question was made contingent upon obtaining the bank's approval, thus no question of illegality arises (see *Malaysian Airline System Bhd v Competition Commission and another appeal* [2021] MLJU 2089). Therefore, the said agreements are not void and invalid. Section 24 of Act 136 relied on by the defendants to declare the said agreements illegal and void, is not applicable to the facts here. The object and purpose of the CPOA and the SCPOA, inter alia, was for the provision of an option to purchase, and an option to sell, shares belonging to the first defendant. The object and consideration here are lawful and do not fall within any of the five circumstances stipulated in s 24 (see *Kin Nam Development Sdn Bhd v Khau Daw Yau* [1984] 1 MLJ 256; [1984] 1 CLJ 347).

[166] As the condition precedent has been fulfilled when the bank gave its approval, it follows that s 36 of Act 136 relied on by the defendants in para 15 of the MOA, is inapplicable.

[167] It follows too that the defendants' plea of restitution does not apply, as the said agreements are not illegal or void. Section 66 of Act 136 in clear terms provides that restitution is only applicable if an agreement is void.

[168] As to other issues that we have not specifically addressed in this judgment, we state that the learned judge was not plainly wrong in his findings.

[169] We conclude by reminding ourselves what was said in *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244 and the reminder by the Federal Court in *Maple Amalgamated* where Tengku Maimun CJ said:

> [85] The overall tenor of the judgments above-cited and the development of the law suggests that in determining whether an agreement in the first place contravenes the law, primacy and due regard must be given to the object and purpose of the law which is said to have been breached. And, where two possible constructions are possible on the law or the facts, that is, one which results in contravention and one that does not, the interpretation which favours commercial sense the one that preferred. The overarching theory behind this thought process, as seen from Lord Devlin's dictum in *St John's Shipping* for example is that the public and reasonable commercial people will have organised their affairs on the assumption that what they are doing or have done is not prohibited by law. It is only when the force of the law is abundantly manifest (whether expressly or impliedly) that such a commercial transaction is in breach of the law and an illegality. And, even then, the armoury of the law is wide enough to not immediately render the agreement void for illegality even in the face of such contravention. In all situations, this illegality assessment depends on the facts of every case and the policy as well as language of the law said to have been contravened.

A CONCLUSION

[170] We therefore dismiss this appeal with costs and affirm the order of the High Court.

B *Appeal dismissed with costs.*

Reported by Nabilah Syahida Abdullah Salleh

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